IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 991...127

BRONISLAW KOZIOL,

Petitioner,

vs.

S/S "FLYGIA", and STOCKHOLMS REDERI A. B. SVEA, of Stockholm, Sweden,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Bronislaw Koziol, a disabled seaman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York (John W. Clancy, D.J.), dated November 16, 1954, dismissing the libel herein (Appendix below, p. 14a), printed in the Appendix hereto, *infra*, page 20, is unreported.

A prior opinion of said District Court dated October 10, 1952, dismissing a prior action at law instituted in August,

1951 and libel in admiralty filed in September, 1951 (Appendix below, p. 11a), printed in the Appendix hereto, *infra*, page 22 is reported in 1953 A. M. C. 220. An opinion of said District Court dated May 12, 1953, dismissing a second previous libel in admiralty (Appendix below, p. 13a), printed in the Appendix hereto, *infra*, page 25, is unreported.

The opinion of the Court of Appeals for the Second Circuit, *per curiam* (Clark, Frank and Hincks, C.J.J.), (R. 31a) printed in the Appendix hereto, *infra*, page 17, is reported in 230 F. 2d Adv. Ops. 651.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, was entered March 7, 1956.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether it was error to hold that the District Court's previous dismissals were *res judicata* settling the question of further litigation in the District Court.

2. Whether notwithstanding the dismissals of previous suits, in the then exercise of the District Court's discretion to decline jurisdiction at those times in the then belief, induced by representations of the Swedish Consulate, that libellant would have an adequate remedy under Swedish law, the District Court of admiralty had jurisdiction of the present libel as amended and erred in dismissing the same without determining the inadequacy of the Swedish "remedy" which had enabled the foreign private insurance company which alone would be liable under such

Swedish remedy to determine in its own favor the question of its own liability, by its own fiat and hearsay "explanation", without any adversary proceeding or hearing before any disinterested or independent tribunal or otherwise.

3. Whether the mail-order "ruling" of the foreign private insurance company that no compensation would be paid by it, and the Royal Insurance Board's statement that the company "explained" its non-liability and that the Board finds no ground for "amending" the company's ruling—both made without trial or hearing, without adversary pleadings to formulate an issue, and without testimony or opportunity for libellant to give testimony or to cross examine the insurance company, or to examine or cross examine the officers, agents and employees of the respondent steamship company—constitutes an adequate remedy or a judicial or other decision or judgment binding on libellant seaman on the merits so as to bar action against respondent for damages or prevent an American admiralty Court taking, or such as to justify its declining to take, jurisdiction of the libel of the injured seaman against the foreign steamship owner and operator.

4. Whether as courts of admiralty the United States District Court and Court of Appeals, under correct principles controlling exercise of discretionary jurisdiction, should have exercised jurisdiction of the libel of this injured foreign seaman, abandoned here, and suing in an American admiralty Court for damages and maintenance and cure; and erred in dismissing the same.

5. Whether the lower courts herein erroneously failed to consider and adequately and accurately appraise and give effect to special circumstances showing that the libellant seaman has been prevented from having and will be deprived of and left without any adequate remedy, either here or abroad, and that the rights of the parties

and the welfare of the nation will be best promoted by the Court entertaining jurisdiction and that such is necessary to prevent a failure of justice.

Constitutional and Statutory Provisions

Art. III, § 2 of the United States Constitution provides:

> "SECTION 2. The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

28 U. S. C. § 1333 provides:

> "§ 1333. Admiralty, maritime and prize cases.
> The District Courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Statement of the Case

Libellant, a Polish national residing at the Port of New York (Libel, par. Fourth, Appendix below, p. 2a), signed on the Swedish vessel, *S.S. Fylgia* at Buenos Aires, Argentina, as messman, on November 7, 1950 (*Id.*, par. Eighth, p. 3a), and was injured November 19, 1950 while on duty. He sues in admiralty for damages for the personal injury (*Id.*, par Twelfth, p. 3a), for neglect to treat (*Id.*, par. Thirteenth, p. 4a), and for maintenance and cure (*Id.*, par. Fourteenth, p. 4a). The libel alleges as the cause of injury unseaworthiness, in that a stairway was dangerous, steep, narrow, improperly maintained and in a dangerous condition, failure to furnish libellant with a safe place in which to work, and neglect of respondent and its officers, and failure of the master and respondent to maintain the vessel and its appliances in a seaworthy condition causing libellant to fall from the stairway and sustain

injury to his hip, spine, head and various other parts of his body (*Id.*, p. 3a).

The libel also shows that libellant instituted a previous civil action for damages in August, 1951, and admiralty action in September, 1951, both of which District Judge Clancy dismissed on October, 1952, stating that "this Court, in the absence of hardship will not exercise its discretionary jurisdiction" and that "all the considerations that persuade the Court to decline jurisdiction of the plaintiff's action in the admiralty Court are reasons for declining jurisdiction of his suit at law as well" (Appendix below, pp. 11a-12a).

The libel also shows that libellant then instituted another suit in admiralty, alleging reasons why the Court should take jurisdiction, which District Judge Clancy dismissed in May, 1953, upon the ground that nothing new was pleaded, and the libelant "has a right under Swedish Law which he can assert *here*" (*Id.*, p. 13a).

This was pursuant to representations made by the Swedish Consulate, in support of respondent's exceptions, that a Swedish remedy under the Swedish compensation laws existed which could be asserted through its advices from here by mail (R. 29a-30a). Libellant then followed the Consulate's instructions as to correspondence with Sweden.

In the present libel, filed in July, 1954, and amended by stipulation dated September 27, 1954 and order dated October 1, 1954, libellant pleads a letter decision from the Royal Insurance Board, rendered in Stockholm, August 18, 1954, referring to a "ruling" of a private insurance company that no compensation could be paid by it to the libellant, for the reason that "*In the ruling*, against which appeal was filed, *the insurance company explained* that the complaint, for which the complainant was admitted to the hospital, *could not be considered caused* by the mentioned

accident"; and stating that the Insurance Board finds that no grounds exist "for *amending the ruling* against which appeal was filed". And libellant alleges "that he has no remedy under the Swedish Law by which he can enforce his rights" (*Id.*, pp. 8a-9a).

Respondent filed a *general notice of appearance* on July 7, 1954 (*infra*, Appendix, p. 26), before the stipulation of September 27, 1954; and later filed exceptions pleading the prior dismissals.

District Judge Clancy, treating the prior dismissals as *res judicata*, and the Swedish "ruling" as effectively denying recovery on the merits, dismissed such amended libel "with prejudice". The Court of Appeals modified the decree to add following the words "with prejudice" the words "as to further actions *in this court*", and as so modified, affirmed the decree, holding that the previous dismissals were *res judicata*, but that the decree should be clear "that pursuit of remedies *in Sweden* was not at all precluded". No means whatever for asserting any further remedies "in Sweden" had been shown by respondent.

Reasons for Allowance of the Writ

The decisions of District Judge Clancy and of the Court of Appeals represent both a radical and novel extension of the doctrine of *res judicata* to a field of discretion where it is inherently inapplicable, and a failure to apply the legal principles controlling the exercise of discretionary jurisdiction. The *res judicata* decisions below deprive the Court of its own discretion.

They also violate fundamental principles of justice and *res judicata* in giving effect to a self-interest "ruling" of a private foreign insurance company respecting its own liability as though it were a judgment of a duly constituted foreign court having jurisdiction of parties and subject matter in an adversary proceeding.

The questions presented are important not only for these reasons, but because the decisions below constitute a precedent and formula whereby foreign shipowners and their foreign insurance companies may with impunity dump and abandon here seamen injured on their vessels, to be treated and cared for in American hospitals and at the expense of some American purse, with no remedy whatsoever either here or abroad. The formula is particularly ominous and unfair when it involves, as here, a foreign seaman of nationality other than that of the vessel and its owners; in this instance, a Polish national abandoned in the United States by a Swedish vessel owner.

If the American admiralty Court is bound (1) by a prior decision declining in its discretion to exercise jurisdiction, upon representation that a foreign remedy will be available, and (2) to give effect as a foreign remedy or adjudication to a ruling of a foreign private insurance company that it is not liable; then the formula is perfect for complete denial of justice, by four simple steps. When first sued, the Swedish (or other foreign) company has the Swedish (or other foreign) Consulate represent to the Court that there is an adequate Swedish (or other foreign) remedy. Then, upon obtaining dismissal in exercise of the admiralty Court's discretion, the seaman is required by the Consulate to file claim with a private insurance company in Sweden (or other foreign country) by mail. The foreign private insurance company then makes a "ruling" that it is not liable to pay any compensation, and the Royal Insurance Board cites the hearsay self-serving "explanation" of the insurance company as reason for not "amending" the insurance company's "ruling". When sued again here, the Swedish (or other foreign) steamship company files a *general appearance* and exceptions claiming that the foreign private insurance company's "ruling" and the American admiralty Court's own prior exercise of discretion are *res judicata*. The

American admiralty Court so rules, and the injured seaman is left here without remedy.

Surely, before such a formula for injustice to seamen abandoned here (and injustice also to the American purse and public) is established by precedent, this Court should review it.

A decision so "unusual"—so fraught with tragic consequences to injured foreign seamen abandoned here and so affecting the American purse and public—we submit, "calls for a critical consideration of the scope and purpose of the doctrine of *res judicata*" by this Court (*Cf., Angel* v. *Bullington*, 1947, 330 U. S. 183, 186), with particular reference both to an admiralty Court's exercise of discretion, and to the quality of foreign "ruling", "remedy" or judgment which is to be recognized as on the merits. It calls for critical consideration also by this Court of the legal principles controlling the exercise of discretion respecting jurisdiction.

Jurisdiction is unquestionable, the admiralty Court, however, having a discretion as to its exercise

> *The Belgenland*, 1885, 114 U. S. 355;
> *The Troop*, 9 Cir., 1904, 128 Fed. 856, 862, cert. denied, 195 U. S. 632;
> 1 *Benedict on Admiralty*, 6th Ed., § 84, pages 261-262.

Respondent's general appearance herein, moreover, waived any objection to the assumption of jurisdiction (*The Ucayali*, E. D., N. Y., 1908, 159 Fed. 800; 1 *Benedict on Admiralty*, 6th Ed., § 84); thereby leaving *res judicata* as its basic jurisdictional plea.

The decision holding prior dismissals in exercise of discretion *res judicata* in a subsequent suit in admiralty is novel. We have found no authority therefor. On the con-

trary, cases holding that *res judicata* applies to questions of jurisdiction as well as to other issues appear invariably to have been cases where there was a determination respecting jurisdiction of the person or of the subject matter —and either that jurisdiction does or does not exist (*i. e., American Surety Co.* v. *Baldwin,* 1932, 287 U. S. 156; 166; *Baldwin* v. *Iowa St. Trav. Men's Assn,* 1931, 283 U. S. 522; *Chicot County Drainage District* v. *Baxter State Bank,* 1940, 308 U. S. 371, 376-377; *Stoll* v. *Gottlieb,* 1938, 305 U. S. 165, 172; *Johnson* v. *Muelburger,* 1951, 340 U. S. 581, 585); and not to have involved the exercise of discretion respecting an existing jurisdiction.

The cases of *Ripperger* v. *A. C. Allyn & Co.,* 2 Cir., 113 F. 2d 332, cert. denied 311 U. S. 695, and *City of Buffalo* v. *Plainfield Hotel Corp.,* 2 Cir., 177 F. 2d 425, 427, cert. denied, 339 U. S. 942, cited by the Court of Appeals below, involved prior decisions as to *lack* of jurisdiction, and *not* as to *discretionary exercise* of jurisdiction.

Res judicata is inconsistent with discretion. To hold that prior decisions whereby the Court, in its discretion, declined to exercise jurisdiction, when induced by representations believed by the Court to be sincere, are *res judicata* when the representations later prove unreal, destroys the very function and purpose of discretion. The decision herein, apparently intended to limit petitioner's remedies, is a precedent which in reality limits unlawfully the Court's discretion and even its admiralty jurisdiction.

Even a dismissal for *lack* of jurisdiction is not *res judicata* of the suitor's *rights* (*Southern Pacific Co.* v. *Bogert,* 1919, 250 U. S. 483, 490; *Smith* v. *McNeal,* 1883, 109 U. S. 426, 429-430; *Hughes* v. *United States,* 1866, 4 Wall. 232; *Bunker Hill & Sullivan Min. & C. Co.* v. *Shashone Min. Co.,* 9 Cir., 1901, 109 Fed. 504, 507). It is doubtless for this reason that it is excepted from Rule 41 of the Federal Rules of Civil Procedure; and with no comparable rule in the Admiralty Rules.

The Court of Appeals recognized that the District Court's dismissal of the present amended libel "with prejudice" was erroneous. But the question arises whether the Court of Appeals did not equally err in its modification of the decree to be "with prejudice *as to further actions in this Court*". There appears to be nothing in the Rules of Civil Procedure, or in the Admiralty Rules, or in the law of *res judicata*, which admits of a dismissal "with prejudice" as to a *single court*. Compare the determination of "the inaccessibility of *all the courts of the State* to such litigation", statutorily prescribed by State statute and held to be *res judicata* in *Angel* v. *Bullington*, *supra*, 330 U. S. 183, 190. There also the "inaccessibility" ruling was that jurisdiction was lacking, and *not* a discretionary decision of the Court to decline to exercise an existing jurisdiction. We submit that a decision is either *res judicata* or *non res judicata*, and either "with prejudice" or "without prejudice", where such conceptions apply; but that they have no application to prior decisions whereby the Court exercised its then discretion to decline discretionary jurisdiction, without either adjudicating the party's rights or having before the Court the circumstances shown in later suit, or respondent's later *general appearance* therein.

The decision treating the "ruling" of the private Swedish insurance company as a "Swedish remedy" which resulted in "denying him recovery on the merits" is a novel decision contrary to all fundamental principles of justice.

It is now clear that instead of a remedy "by a Governmental Agency", petitioner was subjected to a claim "against" a private insurance company being determined by "decision of" the private insurance company (*Cf.*, pars. 3 and 4 of the Consul's affidavit, *infra*, Appendix, pp. 27-28).

Over a century ago, even the courts of England (without being subject to any "due process of law" Constitu-

tion such as ours) refused to give any recognition to a so-called judgment of a foreign quasi-judicial Danish "court", composed of the parties interested on one side of the controversy (*Price* v. *Dewhurst*, 1837, 8 Simons' Rep. 279; Donnelly 264; 6 L. J. Ch. 226; 59 E. R. 111), notwithstanding an "appeal" therefrom comparable to that to the Royal Insurance Board here (8 Sim. 287). See discussion of *Price* v. *Dewhurst* in *Piggott's Foreign Judgments and the Practice as to Parties Out of the Jurisdiction*, 2d Ed., page 117. See also as to rulings by "fantastical courts", *Id.*, page 211. See also 3 *Freeman, Law of Judgments*, 5th Ed., § 1501, page 3079; § 1498, page 3076; and vol. 2 *Id.*, § 633, page 1334.

This Court itself has held that the disallowance by the Board of Audit of the District of Columbia of a claim against the District did not conclude the plaintiff, saying:

> "That board was not a judicial body, whose action was final; it exercised little more than the functions of an accountant. A claim allowed by it was not necessarily a valid one; a claim disallowed was not, therefore, illegal. Its action either way left the matter open to contestation in the courts."
>
> *District of Columbia* v. *Cluss*, 1880, 103 U. S. 705, 706.

See also:

> *Board of Commrs.* v. *Cypert*, 65 Okla. 168, 166 P. 195.

There is presented the novel and important question, which the English Court thus stated in *Price* v. *Dewhurst*, *supra:*

> ". . . the question is whether it is not *contrary to the common course of justice* that anything should be called a judgment, or be allowed to have any effect, where the persons to decide, are the interested persons, and where those persons are found to decide in their own favour." (2 Sim. 305-306.) (Italics ours.)

This Court has held, of comparable questions arising under the Railway Labor Act, that rights "would be sacrificed or obliterated" (*Steele* v. *Louisville & Nashville R. R. Co.*, 1944, 323 U. S. 192, 207), and "would become rights more of shadow than of substance" (*Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 1945, 325 U. S. 711, 736), if an employee not a member of the union could be foreclosed by act or decision of the union where their interests were "opposed or hostile" (325 U. S. 736). Certiorari was granted because of the novel and important questions (325 U. S. 712, 713; 323 U. S. 194). In both cases dismissal was held erroneous.

As said by Judge Learned Hand, writing for the Second Circuit (Hand, Frank and Medina, C.J.J.) in the recent Railway Labor Act case of *Ruchlik* v. *Pennsylvania RR Co.*, 2 Cir., 1956, 229 F. 2d Adv. Op., 171, 175:

> "*Nothing could more completely defeat the most elementary requirements of fair play.*" (Italics ours)

The Court adopted the *ratio decidendi* of the District of Columbia Circuit in *Edwards* v. *Capital Airlines*, App. D. C., 1949, 176 F. 2d 755, 761, where that Court held that "the danger to the rights of the non-member few, *clearly inherent in the combination of circumstances here present*, calls for the application" of the "time honored function" of a Court and right of a party "to have a *court* examine the award *and the procedure* from which it resulted." (Italics ours.)

The decision below conflicts in principle with the foregoing and following decisions and the novel questions presented are of greatest importance.

This Court has repeatedly held that "the rudimentary requirements of fair play" require more of a quasi-judicial administrative agency (*Morgan* v. *United States*, 1938, 304 U. S. 1, 15; *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 1937, 301 U. S. 292, 304; *Chicago, M. &*

St. P. R. Co. v. *Polt*, 232 U. S. 165, 168); and these principles are applicable to any workmen's compensation proceeding (*Massachusetts Bonding & Insurance Co.* v. *Industrial Accident Com.*, 74 Cal. App. 911, 170 P. 2d 36).

This Court held in ***Windsor*** **v. *McVeigh*, 1876, 93 U. S. 274, 280, 281, that "proper judicial proceedings" are essential to the recognition of any binding effect of a purported judgment. The Court quoted with approval Mr. Justice Story's statement in *Bradstreet* v. *Neptune Insurance Co.*, 3 Sumn. 601, Fed. Case No. 1793 (respecting a foreign judgment obtained without proper proceeding and opportunity for hearing and trial of issues) that "*upon the eternal principles of justice*" and because "it tramples under foot all the doctrines of international law, and is but a solemn fraud", the foreign ruling or purported judgment were "mere mockeries, and as in no just sense judicial proceedings" and "ought to be deemed, both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds".**

This Court has held even that a "judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit" (*United States* v. *Johnson*, 1943, 319 U. S. 302, 304, 305, citing *Gardner* v. *Goodyear Dental Vulcanite Co.*, 1873, 131 U. S. ciii, Appx.). The Swedish insurance company here *made* the "ruling" treated below as constituting the "Swedish remedy".

The question of the validity and effect of the "ruling" treated as the "Swedish remedy", of course, is a question to be determined by the law of the forum (*Baskin* v. *Montedonico*, 6 Cir., 1940, 115 F. 2d 837, 839) *i.e.*, here American law; and "fraud affecting the jurisdiction is equivalent to a lack of jurisdiction" (*Wyman* v. *Newhouse*, 2 Cir., 1937, 93 F. 2d 313, 315) of the foreign company and Board to make the foreign "ruling".

The decision in giving effect to the "ruling" of the Swedish insurance company herein as "denying him re-

covery on the merits", instead of considering it a ground for exercising jurisdiction and adjudicating the rights of the parties, conflicts in principle with the foregoing decisions and violates "the eternal principles of justice".

The decision also conflicts in principle, and in some respects directly, with many decisions, old and recent, respecting the necessity for exercise, the method of exercise, and the principles upon which there shall be exercised, a sound judicial discretion in determining to exercise or decline jurisdiction in a case involving a foreign seaman.

In *The Falco*, 2 Cir., 1927, 20 F. 2d 362, 363, no less authority than Judge Learned Hand stated that:

> ". . . courts of admiralty, which are sensitive to a seaman's rights, or at least have always professed to be, will in such cases before turning him out of court, satisfy themselves that there are no special circumstances which will leave him without adequate remedy."

In *The St. Oloff*, Fed. Case No. 17,357, the Court first entertained a proposal from the Swedish Consulate that the men complaining be discharged from the one vessel and shifted to another vessel to return to Sweden, so that the dispute might be determined in Sweden by a Court of that country. But when the Consul later disaffirmed such proposal and stated that he "could not permit the seamen to be received on board of any other vessel" (p. 593), the American Court exercised jurisdiction.

In *The Troop, supra*, 9 Cir., 1904, 128 Fed. 856, cert. denied 192 U. S. 632, the Court, in affirming exercise of jurisdiction, where the vessel was British and the seaman German, said:

> *"To have relegated the appellee to an English court would almost certainly have been to deny him any remedy. He, a German, was left on American soil,*

crippled and without means. He has prosecuted his suit in forma pauperis. If he had been able to go to England, *he could not know when the Troop would be there, or that she would ever be there, or that, if she were, any of his witnesses would be on board or within his reach.*" (128 Fed. 862-863.) (Italics ours.)

In *The S.S. Emmy*, S. D. N. Y 1940, 39 F. Supp. 871, 872, in exercising discretion to retain jurisdiction of a libel by an Italian injured on a Greek vessel, Judge Coxe said:

> "He has never been in Greece, does not speak the language, the witnesses are here, and it would be a clear denial of justice if he were required to go to Greece to litigate his claim."

In *Gonzales* v. *Dampskslsk Dania A. S. The Danvig*, S. D. N. Y., 1952, 108 F. Supp. 908, the Court exercised jurisdiction where the seaman, a Spanish national, signed articles in Venezuela on a Danish vessel and sued for an injury sustained on the Danish vessel.

Judge Clancy's persistence in turning Koziol out of court is wholly out of accord with the decisions cited, including those of the Southern District of New York. Compare the commendation by this Court in Justice Brandeis' opinion in *Southern Pacific Co.* v. *Bogert*, *supra*, 250 U. S. 483, 489, of counsel having "with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy", where there had been four prior suits and nine intermediate appeals in both State and Federal courts.

The "availability of witnesses" (*O. & Y. Nuri* v. *Johannna*, 4 Cir., 1954, 210 F. 2d 261), the discharge of the seaman here, and the fact that his counsel is here and has prepared his case (*The Fletcher* v. *Arias*, 4 Cir., 1953, 206 F. 2d 267, 270) are held in the Fourth Circuit to justify assuming jurisdiction. On facts showing that it is necessary "to prevent a failure of justice, or when the

rights of the parties would be thereby best promoted" the Court should exercise jurisdiction (*Heredia* v. *Davies*, 4 Cir., 1926, 12 F. 2d 500; *The Fletero* v. *Arias*, *supra*, 206 F. 2d 270).

"Particularly is this true when to dismiss the case here would require libellant to pursue his rights in the courts of a foreign government" obviously opposed to affording him any rights (*The Fletero* v. *Arias*, *supra*, 206 F. 2d 270).

More especially is this true, therefore, where the precedent will establish a formula for foreign vessels to abandon here injured seamen of a nationality other than that of the owner—with the hospitalization and care of the man effectively shifted from the economy of either the owner or his country to the American health service and purse.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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OPINION APPENDIX

Court of Appeals' Opinion Sought to be Reviewed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 260—October Term, 1955.

(Argued February 15, 1956 Decided March 7, 1956.)

Docket No. 23571

BRONISLAW KOZIOL,

Libellant-Appellant,

v.

S/S "FYLGIA" and STOCKHOLMS REDERI A. B. SVEA, of Stockholm, Sweden,

Respondent-Appellee.

Before:

CLARK, *Chief Judge*, and
FRANK and HINCKS, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, *Judge.*

Bronislaw Koziol appeals from the dismissal of his libel for personal injuries alleged to have been suffered at sea on November 19, 1950, while employed as a seaman on board the respondent S/S "Fylgia." Modified and affirmed.

SILAS BLAKE AXTELL, New York City, *for libellant-appellant.*

DAVID P. H. WATSON, New York City (Haight, Gardner, Poor & Havens and James M. Estabrook, New York City, on the brief), *for respondent-appellee.*

Court of Appeals' Opinion Sought to be Reviewed.

PER CURIAM:

Libellant, a Polish merchant seaman, signed shipping articles in Argentina on November 7, 1950, to serve as a messman aboard the respondent S/S "Fylgia," a Swedish vessel, and was injured while at sea on November 19, 1950, in descending a stairway on the ship. He has brought to the court below a total of one civil action and three libels, in all of which Judge Clancy has successively refused to take jurisdiction. Originally he made claim under the Jones Act, but appears at present to have given that up, since it is now clear that that Act is not applicable. *Lauritzen* v. *Larsen*, 345 U. S. 571. Later libels have been based on the general maritime law. It is settled law, however, that the district court had discretion to refuse jurisdiction of this suit in admiralty between foreign nationals; and this discretion will not be reviewed except for abuse. *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 418; *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika og Australie Line*, 2 Cir., 65 F. 2d 392. Attempts of libellant to show some compulsion to accept such claims based on various enactments favoring seamen, such as that allowing seamen to sue without prepaying fees or costs or furnishing security, see 28 U. S. C. §1916, revising the former §837, are wholly unconvincing. And there is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libellant's rights would be adequately, if not better, adjudicated in Swedish tribunals.

Judge Clancy ruled in the last libel, the one now before us, that his previous decisions were *res judicata*, and directed dismissal of the libel "with prejudice." It is true that libellant here purported to set up a new and additional "cause of action," but that alleged merely certain steps of his to pursue a Swedish remedy and his dissatisfaction with the results denying him recovery on the merits. This added

no new claim, but was still based upon the original claim of the injury on shipboard at sea. We think the previous suits could properly be taken as settling the question of further litigation in the court below. *Ripperger* v. *A. C. Allyn & Co.*, 2 Circ., 113 F. 2d 332, certiorari denied 311 U. S. 695; *City of Buffalo* v. *Plainfield Hotel Corp.*, 2 Cir., 177 F. 2d 425, 427, certiorari denied *Plainfield Hotel Corp.* v. *City of Buffalo*, 339 U. S. 942. But the decree should be clear, just as Judge Clancy intended, that pursuit of remedies in Sweden was not at all precluded. From the standpoint of greater assurance it thus seems desirable that there should be added to the words "with prejudice" in the decree below the following: "as to further actions in this court." With this addition and modification the decree below will be affirmed. No costs will be taxed on this appeal.

Modified and affirmed.

District Court Opinion of Dismissal Reviewed Below.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 182-233

BRONISLAW KOZIOL,

Libellant,

against

STOCKHOLMS REDERI A. B. SVEA OF STOCKHOLM, SWEDEN,

Respondent.

and against

S.S. FYLGIA.

CLANCY, D. J.:

The amended libel is dismissed. The added so-called additional fourth cause of action as amended in the Court's opinion does not state a cause of action. But, assuming it did, I would dismiss it because I have already held twice that the Court will not take jurisdiction of this plaintiff's suit for injuries on board the respondent's ship on November 19, 1950 and the alleged fourth cause is part and parcel of it. This action is nothing more than a collateral attack on the disposition of the earlier cases. Furthermore, the complaint and the exception show that he has prosecuted his claim where he contracted to prosecute it: that it was considered and denied.

Dated: New York, N. Y., November 16, 1954.

JOHN W. CLANCY,
U. S. District Judge.

District Court Order of Dismissal With Prejudice Reviewed Below.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on November 12, 1954, before the Honorable John W. Clancy, U. S. D. J., on the exceptions of the respondent to the amended libel and Haight, Deming, Gardner, Poor & Havens, David P. H. Watson, of counsel, having appeared for the respondent in support of said exceptions, and Silas B. Axtell, Esq., Martin T. Stein, Esq., of counsel, having appeared in opposition thereto, and the Court, after due delberation, and after considering the exceptions to the amended libel, the memorandum of law submitted in support thereof, and the affidavit and memorandum submitted in opposition thereto, having handed down its opinion, dated November 16, 1954, sustaining the exceptions of the respondent to the amended libel, and dismissing the amended libel, it is

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent,

ORDERED, ADJUDGED AND DECREED, that the amended libel be and the same hereby is dismissed with prejudice.

Dated: New York, N. Y., December 2, 1954.

(s) JOHN W. CLANCY,
U. S. D. J.

District Court Opinion Dismissing First Libel and Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 68—397

BRONISLAW KOZIOL,

Libellant,

against

s/s FYLGIA and STOCKHOLMS REDERI A. B. SVEA,

Respondent.

Adm. 170—22

BRONISLAW KOZIOL,

Libellant,

against

s/s FYLGIA and STOCKHOLMS REDERI A. B. SVEA, of Stockholm, Sweden,

Respondent.

OPINION

CLANCY, D. J.:

In August 1951, plaintiff instituted an action at law naming the steamer Fylgia and Stockholm Rederi A. B. Svea as defendants. In September 1951, he instituted an admiralty action against the steamer and the same corpo-

ration. Both complaint and libel allege the same injury and the same grounds for the actions and the corporate defendant, a Swedish corporation which was served in both, moves to dismiss both. The libelant and plaintiff is a Polish national. He signed articles on the "Fylgia", a Swedish flag vessel at Buenos Aires on November 7, 1950. The admiralty libel says that he resides in the Port of New York from which he has been shipping out as a seaman for a number of years. The complaint in the law action merely states that he is presently domiciled in the City of New York. The affidavit of his counsel, however, says that "he temporarily resided in the Argentine", and it seems apparent that his residence here consisted of a brief stay since his injury or possibly short prior stays between trips. The injury occurred on the high seas. Under such circumstances an injured seaman has no claim under the Jones Act. *The Paula*, 91 Fed. (2d) 1001. The so called residence does not serve such a claim. *O'Neill* v. *Cunard White Star Line*, 160 Fed. (2d) 446. The rights of plaintiff and libellant whatever they may be, are determinable under Swedish Law. *O'Neill* v. *Cunard White Star Line*, *supra*, and this Court, in the absence of hardship will not exercise its discretionary jurisdiction to determine them. *Jonassen* v. *Norwegian American Lines*, 1952 A. M. C. 1144.

The only point that plaintiff's counsel makes is the peril alleged to attend plaintiff's re-entry into Poland. If the peril be demonstrable it is relevant only to a claim that he has no remedy but respondent shows without contradiction that relief may be had by libellant before the Swedish Consul here.

The law governing the trial and decision of plaintiff's case on the law side is still the general maritime law as developed by our Congress and Courts. *Jansson* v. *Swed-*

ish American Lines, 185 Fed. (2) 212; *Doucette* v. *Vincent, et al.*, 194 Fed. (2d) 834, and that recognizes Swedish law as the basis for a recovery and damages. Hence all the considerations that persuade the Court to decline jurisdiction of the plaintiff's action in the admiralty court are reasons for declining jurisdiction of his suit at law as well.

The motions to dismiss both actions are granted.

Dated: New York, N. Y., October 10, 1952.

JOHN W. CLANCY,
United States District Judge.

District Court Opinion Dismissing Second Libel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 177-89

BRONISLAW KOZIOL

Libellant,

against

s/s FYLGIA and STOCKHOLMS REDERI A. B. SVEA, of Stockholm, Sweden,

Respondent.

This motion is granted. Nothing new is pleaded. Indeed, the fact is established that the libelant has a right under Swedish Law which he can assert here. That he is dissatisfied with the outcome of his effort does not confer any new status or privilege upon him.

Dated: May 12, 1953.

JOHN W. CLANCY,
U. S. D. J.

Notice of Appearance Filed by Respondent on July 7, 1954 in District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 182-233

BRONISLAW KOZIOL,

Libellant,

against

STOCKHOLMS REDERI A. B. SVEA OF STOCKHOLM, SWEDEN,

Respondent,

and against

S/S FYLGIA.

SIRS:

PLEASE TAKE NOTICE that the respondent above named hereby appears in this cause and that we are retained as its proctors.

Dated, New York, N. Y., July 6, 1954.

Yours, etc.,

HAIGHT, DEMING, GARDNER, POOR & HAVENS,
Proctors for Respondent,
80 Broad Street,
New York 4, N. Y.

To:

WILLIAM V. CONNELL, Esq.,
Clerk.

SILAS B. AXTELL, Esq.,
Proctor for Libellant,
15 Moore Street,
New York 4, N. Y.

Affidavit of Swedish Consul Inducing Prior Dismissal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A. 177-89

BRONISLAW KOZIOL,

Libellant,

against

s/s FYLGIA and STOCKHOLMS REDERI A.B. SVEA, of Stockholm, Sweden,

Respondent.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KURT LEIJON, being duly sworn, deposes and says:

1. That he is the Consul of the Royal Consulate General of Sweden in New York, and that he has been informed and verily believes that Bronislaw Koziol was a member of the crew of the Swedish vessel m/s Flygia in November, 1950, and that Bronislaw Koziol was at the time a Polish citizen.

2. That he has been informed and verily believes that Bronislaw Koziol seeks a recovery in this Court for injuries alleged to have been sustained aboard the m/s Fylgia on November 19, 1950, and that it is further alleged, in effect, that no remedy is available to him under the Swedish law.

3. That under the Swedish law, a Swedish shipowner is required to take out insurance in order that compensation may be provided to seamen aboard Swedish vessels

for the results of accidents occurring during the course of their employment. The Act of June 17, 1916, provides that this insurance is to be carried out by a Governmental Agency or by a private mutual company especially founded for the purpose and authorized to carry out such insurance by the Swedish Government.

4. That any claim which Bronislaw Koziol might have against the Swedish Accident Insurance Company is to be settled in accordance with this Act of June 17, 1916, which also provides that if the injured seaman is not satisfied with the initial decision of the Accident Insurance Company, or if the seaman's claim is declined, then an appeal may be taken to the Royal Insurance Advice Board, whose decision is then final.

5. That the procedure to be followed when making such an appeal to the Royal Insurance Advice Board is to write a letter to the Board stating that the decision of the Accident Insurance Company is appealed. This letter should contain a reference to the Registry Number of the company, in this case No. 574291, and should be accompanied by whatever affidavits, medical certificates or hospital reports might be pertinent to an appeal from the decision.

6. That the letter of appeal should be delivered to the Swedish Consulate General in New York and addressed to Kungliga Forsakringsradet, Nybrogatan 57, Stockholm.

/s/ KURT LEIJON

(Sworn to April 21, 1953.)

JUN 21 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 91 [illegible] 127

BRONISLAW KOZIOL,

Petitioner,

against

S/S "FYLGIA", and STOCKHOLMS REDERI A.B. SVEA, of Stockholm, Sweden,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT STOCKHOLMS REDERI A.B. SVEA IN OPPOSITION

JAMES M. ESTABROOK,
Counsel for Respondent,
Stockholms Rederi A.B. Svea,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 991

BRONISLAW KOZIOL,

Petitioner,

against

S/S "FYLGIA", and STOCKHOLMS REDERI A.B. SVEA, of Stockholm, Sweden,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT STOCKHOLMS REDERI A.B. SVEA IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Pet. 20), dated November 16, 1954, dismissing this libel is not officially reported, but is unofficially reported at 1956 American Maritime Cases 717, 719.

The opinion of the United States Court of Appeals for the Second Circuit (Pet. 17), is officially reported at 230 F. 2d 651, and unofficially reported at 1956 American Maritime Cases 717.

and First Complaint (Pet. 22), is not officially reported, but is unofficially reported at 1953 American Maritime Cases 220.

The District Court opinion dismissing the Second Libel (Pet. 25), is not officially reported, but is unofficially reported at 1956 American Maritime Cases 717, 719.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

The Statutes Involved

No United States statutes are involved.

The following statutes of the Kingdom of Sweden which form the basis for the affidavit of the Consul General of Sweden set out on pages 27 and 28 of the Petition are involved:

1. Section 34 of the Royal Ordinance of June 9, 1939. (Covering the hiring aboard of crews of Swedish vessels before Swedish Consuls.)
2. Section 1 of Article 47 of the Royal Ordinance of June 9, 1939. (Providing that all crews aboard Swedish vessels shall serve subject to the Swedish law.)
3. Section 11 of Chapter 11 of the Merchant Seaman Law of June 15, 1922. (Providing that the shipping and discharge of seamen on Swedish vessels shall be subject to Swedish law.)
4. Accident Insurance Act of June 17, 1916. (Making shipowners liable to seamen on Swedish ships for injuries without fault on principles of workmen's compensation and requiring Swedish shipowners to insure their liability to crews of their vessels.)

Questions Presented

1. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the District Judge had not abused his discretion in declining to retain jurisdiction of this suit between aliens involving an alleged injury to a Polish seaman aboard a Swedish vessel on the high seas.

2. Whether the United States Court of Appeals was correct in holding that the District Court was bound by its earlier, un-appealed from rulings in which it had already held three times that the Court would not retain jurisdiction over petitioner's cause of action against respondent.

Statement

According to the amended libel (App. App. 1A),* the petitioner was a merchant seaman of Polish nationality (Article Fourth), who signed shipping articles in Argentina on November 7, 1950, to serve aboard the m/s Fylgia as a messman (Article Eighth). The respondent, the owner, operator and manager of the m s Fylgia (Article Third), was and is a Swedish corporation with a principal place of business in Stockholm, Sweden, and with no office and place of business within the District (Article Second). The m/s Fylgia was a Swedish vessel (Article First). The petitioner alleges he was injured on November 19, 1950, while descending a stairway on board the m s Fylgia (Article Tenth).

There have been a total of one civil complaint and three libels in admiralty filed in the District Court on behalf of this petitioner, all covering the same claim. They will be referred to in this brief in their chronological order as the First Complaint and the First, Second and Third Libels.

* App. App. refers to Appellant's Appendix in the United States Court of Appeals for the Second Circuit.

All have been dismissed by the District Court. No appeals were taken from the District Court dismissals of the First Complaint, or the First and Second Libels. The petitioner appealed to the United States Court of Appeals from the dismissal of the Third Libel, and is now petitioning to this Court from the affirmance of the dismissal of the Third Libel by the United States Court of Appeals.

Originally a civil action was filed in the United States District Court for the Southern District of New York, Civil Number 68-397 on August 9, 1951. This was the First Complaint.

The First Libel was filed in the same Court under Admiralty Number 170-22 on September 21, 1951.

The parties to the First Complaint and to the First Libel were the identical parties presently in this action. Both actions sought damages for the identical alleged injury and the jurisdiction of the District Court was invoked under the Jones Act, Title 46 United States Code § 688, and the General Maritime and Admiralty Law of the United States.

The respondent moved against the First Complaint and the First Libel and asked the Court to dismiss on the grounds that the Jones Act was not applicable and also asked the Court to decline to retain jurisdiction over the balance of the cause of action under the General Maritime and Admiralty Law. As a result of these motions a decree was entered on October 28, 1952, dismissing the First Libel and an order was entered dismissing the First Complaint on October 29, 1952. No appeal was taken from these dismissals. The District Court opinion will be found at page 22 of the Petition.

Several months later on March 12, 1953, the Second Libel (Admiralty Number 177-89) was filed in the same Court. Libelant again sought a recovery under the General Maritime and Admiralty Law of the United States for the same injuries but abandoned the claim to the Jones Act. The respondent excepted to the Second Libel and asked the

Court to dismiss on the grounds that it would not retain
jurisdiction of the cause of action and also on the grounds
hat the issue of the jurisdiction of the Court over the cause
f action had already been decided and that nothing new
ad been pleaded. As a result of the exceptions, a decree
as entered on May 21, 1953, dismissing the Second Libel.
gain no appeal was taken from the dismissal. The Dis-
ct Court opinion is set out on page 25 of the Petition.

Over one year later, on July 2, 1954, the Third Libel
dmiralty Number 18?-233) was filed in the same Court,
in seeking a recovery under the General Maritime and
niralty Law of the United States for the very same
uries. On October 4, 1954, this libel was amended by
addition of Article Twenty-Fifth.

espondent filed exceptions to the Third Libel under Rule
f the Admiralty Rules of the United States District
t for the Southern District of New York on the grounds
the Court had already ruled three times that it would
ne to retain jurisdiction of the action by petitioner
ast the respondent all based upon the same injuries.
xceptions and exceptive allegations are set forth on
2a-8a of Respondent's Appendix in the Court of
als.

a result of these exceptions a decree was entered on
ber 2, 1954, dismissing the Third Libel. The Dis-
ourt opinion is on page 20 of the Petition.

tioner's appeal to the United States Court of Appeals
Second Circuit from the latter decree resulted only
odification of the decree to the extent that instead
libel being "dismissed with prejudice" it was dis-
"with prejudice as to the further actions in this
(Petition pages 17-19).

asis for the affirmance by the United States Court
als was twofold: first, that there were no grounds
ng that the District Court abused its discretion in
to retain jurisdiction of the suit in admiralty be-

tween foreign nationals; and second, that the prior dismissals, three in number, none of which were appealed from, "could properly be taken as settling the question of further litigation in the Court below" (230 F. 2d 651, 652).

ARGUMENT

This being a suit between foreigners, and admittedly so by the very wording of the libel, entertainment of the cause of action was within the discretion of the District Court. Petitioner admits as much on page 8 of his Petition when he states that the Court in admiralty had discretion as to the exercise of its jurisdiction.

The authorities on this point are profuse, starting with *The Belgenland*, 114 U. S. 335 (1885), in which it was early held that in an admiralty suit between foreigners the question was not whether jurisdiction existed in the District Court, but only whether it should or should not be exercised. Or as stated by Mr. Justice Brandeis in *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413 (1932) at page 421:

> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts [citations]. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences [citations], or to claims of personal injury [citations]."

Nor did the fact that a general appearance was filed on behalf of the respondent, Stockholms Rederi A.B. Svea after the filing of this Third Libel, in any way preclude the respondent from moving the District Court to decline jurisdiction of the cause of action. The sole decision cited by petition on page 8 of his Petition for this proposition was a suit in the United States District Court for the Eastern

District of New York in 1908 in which respondent made such a motion to the Court after having appeared and after having *served and filed an answer* to the libel, thereby joining issue in the suit. Clearly such a procedure demonstrated an intention to submit the controversy to that Court upon its merits. In the instant matter no answer was ever filed on behalf of respondent, either to the Third Libel, or even to the First Complaint or the First or Second Libels.

In the case of *Canada Malting Co.* v. *Paterson Co.*, supra, the respondent appeared generally and filed a stipulation for value to release a vessel which had been attached under a writ of foreign attachment. Having appeared generally and having filed such a stipulation, the respondent then moved the Court to decline to retain jurisdiction of the cause of action (51 F. 2d 1007, S. C. A. 2, 1931). In the words of Mr. Justice Brandeis at 285 U. S. 422:

> "Obviously, the proposition that a Court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners."

All the appearance does is to indicate to the Court that the respondent concedes that the Court has jurisdiction over it as an individual. The general appearance on behalf of the respondent who has been served personally, or whose property or vessel has been attached, does not constitute a consent to the jurisdiction of the Court over the cause of action. There is nothing implicit in the filing of an appearance beyond the fact that respondent does not contest the service of process. This respondent has never contended that the Court did not have jurisdiction over the parties. The point raised by the respondent was that it did not feel that the Court should entertain jurisdiction of the cause of action between the alien libelant and the alien respondent for injuries which were sustained aboard the Swedish vessel on the high seas following a foreign sign-on.

In connection with the effect of a general appearance, it should be noted that under Rules 12(b) and 12(h) of the Federal Rules of Civil Procedure, the old "special appearance" has been eliminated, with the result that the filing of a general appearance or even the filing of an answer constitutes no waiver of *any* defenses, either as to the jurisdiction of the Court over the defendant or as to the jurisdiction of the Court over the cause of action.

Respondent's second argument is that the United States Court of Appeals was correct in holding that:

> "* * * the previous suits could properly be taken as settling the question of further litigation in the Court below."

It will be remembered that the First Complaint and First and Second Libels were all dismissed in the District Court after the District Court had declined to retain jurisdiction of the cause of action. No appeals were taken from any of these dismissals. Subsequently the Third Libel was filed and the District Court held for the fourth time that it would not entertain jurisdiction of the libelant's cause of action against the respondent. The language of the Court of Appeals in its opinion supported the respondent's position that the prior dismissals, none of which were appealed from, had become final insofar as the entertainment of the suit in the United States District Court for the Southern District of New York was concerned. The Court of Appeals agreed with District Judge Clancy, for in dismissing the Third Libel Judge Clancy wrote:

> "This action is nothing more than a collateral attack on the disposition of the earlier cases" (Pet., p. 20).

It has never been urged by the respondent that the prior dismissals constituted any final decision on the merits of the action, but only that they were final as to the retention or rejection of jurisdiction by the District Court. This Court has held that the question of the jurisdiction of the District Court over the cause of action is subject to the

principle of *res judicata*. *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931); *Stoll* v. *Gottlieb*, 305 U. S. 165, 176 (1938); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939), and *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 403 (1940).

Petitioner argues that an exercise of discretion by the District Court is not compatable with finality or with the doctrine of *res judicata*, and that there should be no finality to the Court's decision to decline in its discretion to entertain jurisdiction. To follow petitioner's argument would be to concede that petitioner could file an endless number of libels until the repeated exceptions filed by the respondent would come on before a District Judge who would exercise his discretion in favor of retention of jurisdiction. But would petitioner at that point urge that the issue of discretionary jurisdiction was finally decided, except for appellate review, or would he then further concede that under his argument the respondent could in turn bring on an endless stream of exceptions, all on the same issue, until respondent was in turn able to effect a reversal of the decision to retain jurisdiction?

Petitioner's argument is clearly ridiculous and would lead to absurd results. As stated by Mr. Justice Roberts in *Baldwin* v. *Iowa State Traveling Men's Assn.*, supra, at page 525:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest, and that matters once tried shall be considered forever settled as between the parties."

The issue of the retention of jurisdiction by the United States District Court over this cause of action between two aliens was contested, not once, not twice, but three times before the Third Libel was ever filed in the same Court.

If petitioner was convinced that there could be no finality to a decision declining to entertain jurisdiction of a cause of action, then why the appeal to the Court of Appeals from

the dismissal of the Third Libel? Why did he not let the time to appeal expire once more, and then proceed to file a Fourth Libel seeking the same relief?

Finally, the respondent urges that the District Judge did not abuse this discretion in declining to retain jurisdiction over the cause of action.

That the decision of the District Court to refuse or retain jurisdiction could only be reviewed upon a showing that the Court abused its discretion was held as early as *The Belgenland*, 114 U. S. 355, 368 (1885). Mr. Justice Bradley characterized as "a very sound view of the subject" the earlier language of Judge Brett when the latter stated:

> "'It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeals holds, that they are justified in saying he has exercised it wrongly'."

Or, in the language of *Canada Malting Co.* v. *Paterson Co.*, *supra*, at page 418:

> "The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and that the exercise of its discretion will not be disturbed unless abused. *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517."

There was no abuse of discretion in the District Court's failure to retain jurisdiction over the cause of action.

The Court of Appeals wrote as follows in its *per curiam* decision:

> "And there is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libelant's rights would be adequately, if not better, adjudicated in Swedish tribunals."

The Decision Below is Clearly Correct

Following the exceptions of the respondent to the First Libel, Judge Clancy set forth the relevant facts in his opinion of October 10, 1952, the text of which is set forth at pages 22-24 of the Petition. Respondent would draw the attention of this Court to Judge Clancy's statement of facts:

> "The libelant and plaintiff is a Polish national. He signed article on the 'Fylgia', a Swedish flag vessel at Buenos Aires, on November 7, 1950. The admiralty libel says that he resides in the Port of New York, from which he has been shipping out as a seaman for a number of years. The complaint in the law action merely states that he is presently domiciled in the City of New York. The affidavit of his counsel, however, says that 'he temporarily resided in the Argentine', and it seems apparent that his residence here consisted of a brief stay since his injury or possibly short prior stays between trips. The injury occurred on the high seas. * * * The rights of plaintiff and libelant, whatever they may be, are determinable under Swedish law."

Based upon that conclusion Judge Clancy declined to retain jurisdiction of the cause of action between the two aliens.

When the respondent excepted to the Second Libel, the affidavit of the Consul General of Sweden in New York was annexed to the exceptions, in which affidavit the Consul General set forth the procedures under the Swedish Law which were to be followed by the petitioner. The text of this affidavit is set forth at pages 27 and 28 of the Petition. The Consul General stated that all relevant papers, including affidavits, medical certificates and hospital reports, which might be considered pertinent were to be delivered to the Swedish Consulate in New York for subsequent transmittal to Stockholm. In his opinion on respondent's

exceptions to the Second Libel (Pet., p. 25) Judge Clancy wrote as follows:

> "Nothing new is pleaded. Indeed, the fact is established that the libelant has a right under Swedish Law which he can assert here. That he is dissatisfied with the outcome of his effort does not confer any new status or privilege upon him."

Over a year after the dismissal of the Second Libel, the Third Libel was filed in July, 1954. This Third Libel differed from the earlier ones only in that the dismissals of the three earlier actions were alleged in a Fourth cause of action and the libelant sought an additional $50,000 in damages by reason of his failure to obtain a money judgment under the Swedish law. On October 1, 1954, petitioner amended his Third Libel so as to include Article Twenty-fifth, which quoted a translation of the text of the decision of the Royal Insurance Board of Stockholm, Sweden. On the basis of that decision by the Royal Insurance Board it was alleged by petitioner that he had no remedy under the Swedish Law by which he could enforce his rights.

The District Court was of the original opinion that the petitioner's rights should be determined under Swedish Law. The Third Libel as amended by the addition of Article 25 is the best proof that the District Court was correct.

Petitioner's real complaint is not that the Swedish authorities did not entertain his claim, but rather that he did not obtain a money recovery under the Swedish Law.

If we compare the explicit instructions set forth by the Swedish Consul General in his affidavit annexed to the exceptions to the Second Libel (Petition, pp. 27, 28) with the procedure that was actually undertaken on behalf of petitioner, we find startling shortcomings. No medical certificates, hospital reports, or substantiating affidavits from witnesses were filed. On page 3 of his brief in the United States Court of Appeals is petitioner's counsel's frank ad-

mission that no medical testimony by way of hospital reports, doctors' depositions or affidavits were submitted either as to petitioner's physical condition before the voyage or as to any traumatic damage sustained. On page 3 of that brief it was stated:

> "Thirdly, petitioner's claim under the Swedish Law merely consisted of filing an affidavit and notice of claim. Said papers were then sent to Sweden to be considered by the Royal Insurance Board and in due time petitioner's claim was rejected."

Counsel did not even bother to file a substantiating affidavit as to the allegedly applicable law.

Petitioner is disappointed because Swedish Law does not go beyond American Law to make a ship responsible for a pre-existing condition and to dispense with medical proof as to causality.

Aside from the question of the extent of the zeal exercised in prosecuting the proceedings under the Swedish Law, the appeal quite clearly was not lost in Stockholm on jurisdictional grounds. There is no question but that the Royal Insurance Board entertained petitioner's claim upon the merits. Article Twenty-fifth of the Third Libel, as amended, shows not that a recovery was unavailable under the Swedish Law, but that no recovery was had for petitioner's failure of proof.

No libelant is guaranteed a *recovery* in any forum. The forum can only assume jurisdiction of the conflict and then proceed to an adjudication upon the merits under the procedural rules of that forum. The transfer of a cause of action from one forum to another, whether it be between States of the United States or from a Court of the United States to a foreign tribunal, does not carry with it a guarantee that a money judgment will be obtained in the second forum.

There Is No Conflict of Decisions

It does not appear from the Petition that petitioner is urging that the decision of the United States Court of Appeals for the Second Circuit is in direct conflict with decisions in any other courts. Perhaps this is because the question of abuse or non-abuse of judicial discretion does not lend itself to formula appraisal. Each case must stand on its own merits and be decided upon its own facts.

There are certain authorities cited in the Petition, however, which might lead one to believe, if no further comment were made, that other circuits had ruled differently in similar situations.

In quoting freely from *The Falco*, 20 F. 2d 362, 1927 A. M. C. 1474 (2 C. A. 1927), on page 14 of the Petition, counsel omits to state that in that case the Court of Appeals affirmed the District Judge's decision to decline jurisdiction of a cause of action between a *Brazilian* seaman and a *Swedish* vessel. The District Judge had held in his discretion that he would *not* entertain the suit and dismissed the libel. The libelant appealed and the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, affirmed the District Court decree. The quotation set forth on page 14 of the Petition is a preamble heading, not to a sustaining of the jurisdiction over the cause of action, but rather to an affirmance of the District Court's rejection of jurisdiction.

Nor are the frequent references to *The Elcano* v. *Arias*, 206 F. 2d 267, 1953 A. M. C. 1392 (4 C. A. 1953), to be found on pages 15 and 16 of the Petition in point. That was an appeal in a suit in admiralty filed by an Argentinian seaman against an Argentinian vessel which was wholly owned by the Argentine Government. Not only did the injuries occur while the vessel was tied up at the dock in Norfolk, Virginia, but plaintiff was also claiming for earned wages and waiting time under Title 46 U. S. Code

596. This statute expressly applies to foreign seamen serving on foreign vessels while in United States ports, Title 46 U. S. Code § 597; *Strathearn S.S. Co. v. Dillon*, 252 U. S. 348 (1920). The District Court was *required* to entertain jurisdiction of the seamen's wage claim and, in the interests of economy of justice, undertook to entertain his claim for injuries sustained in United States waters at the same time. This petitioner is not proceeding under any statute which *requires* the United States District Court to entertain jurisdiction of his cause of action.

The same must be said for the references to *Heredia v. Dacies*, 12 F. 2d 500 (4 C. A. 1926), on page 16 of the Petition. This was an appeal by the shipowner after a trial on the merits, during the course of which the shipowner claimed that the District Court should not have assumed jurisdiction of the cause of action. Judge Parker, in affirming the correctness of the assumption of jurisdiction, pointed out that the injury had been sustained aboard the vessel while she was at the dock in New York City (p. 500) and that:

> "As the injury complained of was received in waters of the United States, we think that the learned District Judge properly held that the rights of the parties were to be determined by the law of this country, the *lex loci delicti*" (12 F. 2d 501).

None of the elements which caused Judge Parker to affirm the retention of jurisdiction by the District Court are present in this case.

There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by This Court

The Petition presents nothing more than the question of whether the dismissals by the District Court of the First Complaint and the First and Second Libels, none

of which were appealed, are to be given any effect, or whether they can be ignored so as to leave petitioner free to file further libels in the same Court seeking the same relief for the same alleged injuries.

Notwithstanding all the discussions in the Petition on the point, the judicial nature of the proceedings in Stockholm are not and never were in issue. Nor did the Court of Appeals base its affirmance upon any rulings made in Stockholm. The basis for the affirmance by the Court of Appeals was that the question of the discretionary jurisdiction of the District Court over the cause of action had been decided by the District Court three times already without any appeal being taken, and on the further ground that the District Judge did not in any event abuse his discretion in declining to retain jurisdiction.

A thorough reading of the opinion of the Court of Appeals (Pet., pp. 17-19) shows that the Court of Appeals in no wise relied upon or gave effect to any foreign ruling either as to jurisdiction or as to the substantive aspects of the claim. It was with this in mind that the Court of Appeals directed that the District Court decree should be modified so as to make it even clearer that the earlier order and the three earlier decrees issuing out of the District Court were not to be considered as precluding any rights which the petitioner might have under the Swedish Law. As modified, the decree of the District Court dismissing the Third Libel could not be seized upon as in any way affecting further proceedings in any Court other than United States District Court for the Southern District of New York.

The frequent characterizations of the proceedings in Sweden to be found in the Petition are unsupported by the record and cannot affect the dispositions by the United States District Court and the Court of Appeals, since these dispositions were predicated upon the prior proceedings in the same District Court.

The promulgation of justice requires orderly rules of procedure, and the rules under which we operate do not give to the losing party in a District Court proceeding the choice between a direct review of the issue by a Court of Appeals and a collateral attack at a later date in another suit in the same District Court.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DAVID P. H. WATSON,
on the Brief.